LEONG WAN YIN & ANOR.

v.

NESTRA PLANTATIONS SDN. BHD.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[HIGH COURT CIVIL SUIT NO. 250 OF 1981]
22 MAY 1986

COMPANY LAW: *Appointment of receivers by the Court - Factors to be taken into account - Principles applicable - Condition precedent of approval by Foreign Investment Committee.*

The plaintiffs and one Encik Mohamed bin Abu Bakar owned 49%, 18% and 30% respectively of the issued capital of one Lemo Sdn. Bhd. (the said company). The plaintiffs entered into a sale and purchase agreement with the defendants, the subject matter of the sale being their respective shareholdings in the said company. The consideration for the sale was RM2,813,000, 10% to be paid as deposit and the balance to be paid in accordance with the terms of the agreement. The provisions of the agreement were made conditional expressly upon the Foreign Investment Committee granting its approval with 180 days from the date of agreement or such "extended period as the parties may agree upon in writing".

Subsequently, the 2nd plaintiff and Encik Mohamed bin Abu Bakar entered into separate agreements with the defendants. The plaintiffs claim rescission of both agreements, contending that the initial sale and purchase agreement is null and void because of breaches of terms of the agreement and for certain misrepresentations. The defendants denied most of the allegations. On 18 March 1986, after application by the plaintiffs, the Official Receiver Malaysia was appointed as receiver and manager of the assets and undertaking of the said company until judgment in this suit, on terms, *inter alia*, that one Tuan Haji Marzuki bin Razalli be retained as manager of the oil palm plantation owned by the said company. The defendants then lodged an appeal against this order of the Court.

Held:

[1] The doctrine in the case of *Macaura v. Northern Assurance Co. Ltd.* [1925] AC 619 should not be so rigidly applied so as to preclude a Court from arriving at the truth or considering the realities of the situation necessary for a Court's just decision.

[2] An application for an appointment of a Receiver must in all cases show a good *prima facie* claim of title, see *Matang Holdings Bhd. & Ors. v. Dato' Lee San Choon & Ors.* [1985] 2 MLJ 40.

[3] After considering the reports of the two planting advisers and taking all the surrounding facts into consideration, the Court held that on the present state of pleadings and evidence, the plaintiffs would appear to have a *prima facie* good claim of title and therefore it was just and convenient in all the circumstances of the case that the order as made should be made with costs in the cause.

[Order accordingly.]

[**Editor's Note:** For further notes on the law in relation to the appointment of Receivers, see Halsbury's *Laws of England,* 4th Edn., para 828.]

Cases referred to:
Macaura v. Northern Assurance Co. Ltd. [1925] AC 619
Inland Revenue Commissioner v. Cleary [1966] 2 WLR 790
Matang Holdings Bhd. & Ors. v. Dato' Lee San Choon & Ors. [1985] 2 MLJ 40

Legislation referred to:
Finance Act 1960 [UK], s. 28

Other source referred to:
Halsbury's Laws of England, 4th Edn., Vol. 39, para. 828

For the plaintiffs - Nagarajah; M/s. Shook Lin & Bok
For the defendants - T.S. Rajan (with Linda Oliveiro); M/s. Nik Saghir Yaacob & Ismail

JUDGMENT

Peh Swee Chin J:

An appeal has been lodged against an order made by this Court on 18 March 1986 on an application of the plaintiffs, whereby the Official Receiver Malaysia was appointed as receiver and manager of the assets and undertaking of one Company called Lemo Sdn. Bhd. until judgment in this suit, on terms, *inter alia*, that one Tuan Haji Marzuki bin Razalli be retained as manager of the oil palm plantation owned by the said Lemo Sdn. Bhd., (the said company). It would be necessary to recapitulate the background leading to the making of the order.

The said company's only known asset is an oil palm plantation. Prior to the filing of this action, the plaintiffs and one Encik Mohammed bin Abu Baker owned 49%, 18% and 30% respectively of the issued capital of the said company. They then entered into an agreement on 8 April 1981 as vendors of the one part, and the defendants as purchasers of the other part, for the sale of their respective shareholdings in the said company to the defendants; in consideration of RM2,813,000, 10% of which was paid as deposit and down payment, with the balance to be paid in the manner provided in the agreement, *inter alia*, allowing for some redemption money payable to a bank and certain liabilities to be set off against such balance. The provisions of the agreement were made conditional, expressly, upon the Foreign Investment Committee granting its approval within 180 days from the date of the agreement or such "extended period as the parties may agree upon in writing". Subsequently the 2nd plaintiff and the said Encik Mohammed bin Abu Bakar entered into separate agreements with the defendants, in respect of which the 2nd plaintiff now seeks in this suit rescission also. The plaintiffs claim several declarations; rescission of the said agreement dated 8 April 1981, and damages. They claim, in particular, that the said agreement dated 8 April 1981 is null and void or otherwise has come to an end for breaches of conditions for failing to pay the balance purchase price; for failing to obtain the approval from the Foreign Investment Committee; and for certain misrepresentations. The defendants have denied most, if not all, the allegations; deny the non-payment of the balance and claim that plaintiffs are estopped, and for other reasons from pleading the point as regards the non-obtaining of the approval from the Foreign Investment Committee.

Of the crucial issues yet to be tried in Court later, the important one would be as to whether the clause relating to the non-obtaining of the approval from the Foreign Investment Committee should be regarded as a condition precedent; whether the admittedly out-of-time approval has been rendered inconsequential, as pleaded by the defendants, by waiver on the part of the plaintiffs; conduct on the part of the plaintiffs preventing its fulfillment; failure of the plaintiffs to terminate in time the said agreement for such lateness in obtaining such

approval; estoppel and that in any event, such approval was obtained within a reasonable time. On the present state of pleadings, subject to various defences just stated, being established later at the trial, the non-obtaining of the approval within the fixed period, and the absence of a prescribed written consent of parties agreeing to any extension of time in regard thereto would not appear to be in doubt. The other important issue is the non-payment of the balance of the purchase price; i.e. 90% of the purchase price of RM2,813,000. This is denied by the defendants as defendants appear to have tendered a sum of RM59,906.46, e.g. to the 1st plaintiff as the 1st plaintiff's share of the balance price and which the 1st plaintiff had rejected. This sum of RM59,906.46 must have been reduced by the defendants from apparently a sum of approximately RM1,278,900 being, before all just deductions, the share of the 1st plaintiff to the said balance. Whether the deductions of the defendants in this connection have been just remain to be resolved at the trial. I must emphasize that the statement of defence merely denies the non-payment of the balance of the purchase price; but the fact that the tender by the defendants and the rejection of the reduced sum by the plaintiff, was gleaned from one letter from the defendants' solicitors to the plaintiff's solicitors and another letter from the plaintiffs' solicitors to the defendants' solicitors, both contained in an agreed bundle of documents. This was done, because, merely to mention the mere denial of non-payment of the balance as so stated in the statement of defence without dipping in advance into these letters in the agreed bundle may not perhaps give rise to a reliable composite picture of the true state of pleadings. Meanwhile, the substantive action has been fixed for continued hearing for 5 consecutive days beginning on 8 September 1986.

The grounds of the plaintiff's application for appointment of a receiver would appear to be that the defendants, the purchasers in the agreement dated 8 April 1981, and hitherto in control of Lemo Sdn. Bhd., had created or attempted to create a second charge over the plantation of Lemo Sdn. Bhd. for a further loan of RM1.4 million; that the defendants themselves were indebted to other creditors; that the management of the plantation had been inefficient; that winding-up proceedings were being commenced against the defendants themselves, whose notable assets was their shareholding in Lemo Sdn.Bhd.; that the plantation was in jeopardy; that there might be depletion and dissipation of assets before judgment; that the defendants owed Hume Industries (M) Bhd. a sum of RM273,862.92 and costs (copy of judgment duly exhibited to the relevant affidavit).

The defendants, through the affidavit of their director, one Encik Mohamed bin Awang stated that the 2nd charge was in fact never registered on account of the permission of State Authority not being received as yet; the loan was required to pay for expenditure for rehabilitation of 700 acres already planted and new planting of the 2nd and final phase of another 1000 acres. He exhibited two reports from 2 planting advisers on their respective visits to the plantation; that though the present indebtedness of Lemo Sdn. Bhd. was RM5.6 million (excluding the proposed loan of RM1.4 million), the plantation would be worth at least RM10 million, on advice of some licensed valuer.

Learned Counsel for the plaintiffs submitted that the plaintiffs feared that there would not be anything left when the civil suit was concluded; that the plantation was in jeopardy; that the Bank Pertanian Malaysia might foreclose the earlier charge and the second charge; that the defendants were themselves heavily indebted to other creditors so that if the defendants were wound up, ultimately the plantation would be affected; that the proposed receiver, being the Official Receiver Malaysia, would be a disinterested person that the earlier interim injunction obtained by the plaintiffs restraining the defendants from managing Lemo Sdn. Bhd. was dissolved because of non-disclosure of material facts.

Learned Counsel for the defendants submitted that the interest of the plaintiffs was in the shares of Lemo Sdn. Bhd., and not in the plantation; that Bank Pertanian had been continuously releasing segments of loans to the Lemo Sdn. Bhd., i.e. without "foreclosing" on any charge and that heavy reliance must be placed on those planting advisers' reports; that there was an earlier application for an injunction to restrain the defendants from managing Lemo Sdn. Bhd. and the application was refused by the Court also.

Before delving into factual matters and the principles applicable in relation to the appointment of receivers, I think I should deal with two legal contentions first, they not being directly related to the said principles of such appointment.

The first legal contention was that the plaintiff's interest in this case was in the shares of Lemo Sdn. Bhd. and not in the plantation in question, and therefore the application of appointment of receiver should not be made. Counsel cited the case of *Macaura v. Northern Assurance Co. Ltd.* [1925] AC 619. In that case, the applicant sold his timber estate to a company in consideration of fully paid shares of the company, which was almost completely owned by him. He took out fire policies to insure the timber and subsequently a fire destroyed most of the timber. The arbitrator ruled that the applicant had no insurable interest in the timber. This was upheld ultimately by the House of Lords when it ended up there. That case in my opinion reinforces, or gave rise to the popular view that a shareholder has no interest, legal or equitable in the assets of the company as distinct from the shares he owns in the company.

Learned Counsel for the defendants submitted that the case of *Macaura* should not be rigidly applied and that the plantation was the only asset of Lemo Sdn. Bhd. He cited the case of *Inland Revenue Commissioner v. Cleary* [1966] 2 WLR 790. In that case, two sisters owned, in equal shares, the capital of two companies, let's say, A and B. Company A had a credit balance on the profit and loss account represented mostly by cash deposited with bankers. The two sisters sold the equal number of some of their shares in Company B to Company A and received the said cash in consideration therefor. The receipt by the sisters of the said cash would be a capital receipt, and not income, so that it would not normally attract income tax liability. In England, the Revenue cast their nets wide, for they had in their arsenal, Finance Act 1960. Section 28 of the Act provided that a taxpayer must show that any tax advantage from any transaction, was not the main object, or one of the main objects of the transaction; thus a considerable burden being placed on the tax payer so to show. The *Macaura* case must have been cited to the Court of Appeal presided over by Lord Denning. It was urged there that the Court should not have lifted the curtain to look inside bodies corporate which must be treated as separate and distinct from the shareholders. Lord Denning considered if the curtain, which concealed the truth, should be lifted, the truth being that each sister withdrew from Company A £60,500 in cash without paying tax on it. Without expressly saying so, Lord Denning lifted the curtain, so to say and found it was a taxable tax advantage and together with the other two Lord Justices, allowed the appeal of the Revenue. Salman LJ, while criticising the decision in *Macaura,* stated that though it was binding on him, it should not be rigidly applied and did not inhibit him from considering the realities of the situation.

I am of the same view as their Lordships that the doctrine in *Macaura* case should not be so rigidly applied so as to preclude a Court from arriving at the truth or considering the realities of situation necessary for a Court's just decision. In the path for truth, no such curtain should be let down between it and the seeker. The truth is that the plantation is the only known asset of Lemo Sdn. Bhd. and that any danger to the plantation, or rather, to be

more precise, any threat to the ownership of the plantation by Lemo Sdn. Bhd., is equally a threat to Lemo Sdn. Bhd.'s shareholders. To allow such a curtain to conceal such truth in this case would be a travesty of justice with which this Court would have no truck. I therefore considered, or permitted myself to consider such truth, or realities of the situation as stated above when considering the appointment of receiver in these.

The second legal contention was that this Court had already and earlier discharged an interim injunction restraining the defendants from managing the affairs of Lemo Sdn. Bhd. The learned Judicial Commissioner who set aside the *ex parte* interim injunction held that on the ground alone of non-disclosure of certain material facts therein the interim injunction should be discharged. On the materials before him, the learned Commissioner also decided that the interim injunction should be dissolved. Mostly and if not completely different facts were placed before him. Here I had to deal with the new matters of attempted creation of a second charge to borrow RM1.4 million; the reports of the planting advisers about the extremely high expenditure incurred while the plantation was under the control of the defendants; different principles of law relating to receivers with the overall principle, i.e. whether it was just or convenient to make the appointment. I therefore did not find substance in this second legal contention.

The law on grounds of application for appointments of receivers appears to be quite settled. However the grounds depend to some extent on the genre of such appointment. There are basically two kinds of appointments -

The first kind of appointment refers to those cases where the Court assists a person to enforce his rights in property by appointing a receiver where the existing legal remedies are either inadequate or ineffective, e.g. in a case of equitable execution or the case of an equitable charge. This first kind of cases also includes appointments provided under statutory provisions, e.g. when a receiver is appointed over the assets of dissolved partnership. In all these cases, it is not necessary to allege and prove danger to the property in question; an appointment is made once the right of the applicant is established.

The second kind of appointment encompasses all those cases where a receiver is appointed for the more directly obvious purpose of safeguarding of property in question for the benefit of those entitled to it, more directly obvious, because the first kind of appointment is also underlined by the same but implied need to safeguard rights in property or property. To continue, examples of the second kind of appointments include appointment pending litigation to decide rights of parties; appointments to prevent a scramble among the beneficiaries pending the grant of probate or of letters of administration; and those cases when there is danger to the property being damaged or dissipated by those in control. The most important feature of this second kind of appointments is that it is necessary to allege and prove danger to the property before an applicant can succeed in securing such an appointment. However, such danger to the property is deemed to be established if an applicant satisfies the Court that he will be in a worse situation if the appointment of a receiver is delayed.

Having dealt with the nature of two kinds of appointments, an application for such appointment must in all cases show a good *prima facie* claim of title and, except in the first kind of appointments, must allege danger and satisfy the Court on such danger to the property in question or he must satisfy the Court that he would be in a worse situation if such appointment is delayed. Please see *Matang Holdings Bhd. & Ors. v. Dato' Lee San Choon & Ors.* [1985] 2 MLJ 40.

It will be desirable, for the purpose of considering the question of merits of the application to deal with the two reports from two planting advisers.

The first report came from Mr. G.C. McCulloch as regards his visit to the plantation, (Ladang Kelapa Sawit Lemo), on 3 October 1981; a date subsequent to the dismissal of KPM Khidmat Sdn. Bhd. as managing agents in May 1981, i.e. after May 1981 when the defendants assumed direct control of the plantation. On his visit he found 840 acres cleared and planted and that after some analysis, he found the cost had come to about RM1,927 per acre planted up to a period of about 9 months from planting, as on the date of visit, and this appeared to him to be extremely high. According to him, the cost of maturity (i.e year of planting plus, say 30 months in the field) should be about only RM1,500 per acre with an upper limit of RM2,000. This was the cost he found at the time of take-over from KPM Khidmat Sdn. Bhd. by the defendants. At time of his visit, some 4 months after the takeover by the defendants, the condition appeared to be "not good enough and to a large extent due to new management being far too slow in implementing upkeep programmes.....".

The next planting adviser's report came from Mr. M.D. Stewart on his visit on 26 - 27 December 1985 some 4 years after the previous visit abovementioned. He found the plantation of 2,000 acres to be fully planted except for unplanted land of 55 acres, 4 acres set aside for nursery and 1 acre for building. The estate manager was found to be one Tuan Haji Marzuki bin Razalli with an assistant manager. He found the management had very much improved since Tuan Haji Marzuki took over though certain urgent measures mentioned by him remained to be taken.

For reaching majority, it will be observed, it should take 2½ years i.e. 1 year of planting plus 30 months. At the very least undoubtedly, at least 850 acres of the plantation had matured already for about 1½ years at the time of filing the application for receiver. They were already then yielding fruits from harvesting and producing income. According to Mr. Stewart's report on his visit in December 1985, another 950 acres were already found to have been planted towards the end of 1983 and also towards the end of 1984. Some of these 950 acres should be now under harvesting.

At the very least, the plantation should be able to pay all expenses including expenses incurred for upkeep. The present indebtedness has reached RM5.6 million. The proposed loan intended to be taken in December, 1982 it would be noted, was not required to reduce such indebtedness, but according to an affidavit of Mohamed bin Awang dated 5 February 1986, was for upkeeping the planted area and planting 1000 acres of unplanted land. The planting of the second and final phase of 1000 acres appears to have been accomplished by the end of 1984. The justification, *prima facie*, for pursuing further the borrowing of the RM1.4 million would appear to have already ceased to exist on the date of the filing of the present application for receiver. The estate would appear to be well managed for the first time under Tuan Haji Marzuki as manager and under whose management great strides appear to have been made. I found every indication on the part of the defendants, that they would persist in borrowing this huge sum of RM1.4 million, presumably on the receipt of the permission from the State Authority. The defendants have not mentioned even the income that the plantation must have been earning. The Court has earlier suggested and discussed with Counsel the possibility of having a consent order incorporating an undertaking from the defendants, (in lieu of a hearing on merits of the application), that they would not create any further charge over plantation for any further loan, or words to the same effect, until further order of this Court, so that the defendants could continue to manage the plantation,

but apparently, they were not amenable to such suggestion. The Court considered that it could not be wrong to assume that they intended to persist in concluding the matter of the second charge, in the face of the absence of the *raison d'etre* for the loan which they invited the Court to accept.

I found there was no such dire need as at the time of hearing the application for creating a second charge for the purpose of borrowing further RM1.4 million having regard in particular to the existing indebtedness of RM5.6 million and the generation of income by the plantation from its mature areas.

I found that on the present state of evidence available, to allow for the creation of the second charge would, in the circumstances, increase the danger of 'foreclosure' proceedings by the bankers as the amount of interest payable, already astronomical would become even more intolerably so, thus posing, if not an immediate danger, at least a serious threat to the future viability of the plantation, and could confront the plaintiff with a tremendous bill to pay should they succeed in this action and take over the control. In this sense, subject to what I have to say in a moment, the plaintiffs would be in a worse situation if such appointment was delayed.

In exercising my discretion in relation to the order, I had considered the importance that the running of the plantation should not be affected as far as possible, and to this end, it was a term of the order that Tuan Haji Marzuki who appears to have done a splendid job of managing the plantation be retained as such manager. I had earlier also considered the question of a good *prima facie* claim of title and satisfied myself, that on the interlocutory application, on the present state of pleadings and evidence the plaintiffs would appear to have *prima facie* good claim of title. The fact that such a title has been disputed should not constitute or bar to such appointment. Please see para 828, Vol. 39, Halsbury's *Laws of England*, 4th Edn. I had considered it just and convenient in all the circumstances of this case (including the fact the Official Receiver Malaysia, who was appointed, would be obviously impartial), that the order as made should be made with costs in the cause.

Also found at [1986] 2 CLJ 31